Nos. 93-1456 and 93-1828

In the

Supreme Court of the United States

October Term, 1994

U.S. TERM LIMITS, INC., et al.,
Petitioners,

v.

RAY THORNTON, et al.,
Respondents.

STATE OF ARKANSAS EX REL. WINSTON BRYANT,
Attorney General of the State of Arkansas,
Petitioners,

v.

BOBBIE E. HILL, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI

The American Civil Liberties Union ("ACLU") is a nonprofit, nonpartisan organization with nearly 300,000

members nationwide, dedicated to the preservation of rights guaranteed by the United States Constitution. The American Civil Liberties Union of Washington ("ACLU-W") is one of its state affiliates. Both the ACLU and the ACLU-W have frequently appeared in this and other courts in the defense of constitutional liberties.

This case concerns issues of fundamental importance in any constitutional democracy. As Chief Justice Warren wrote, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Because of their unique perspective and history of defense of voting rights and constitutional liberties, these *amici* respectfully submit this brief in support of respondents on the merits.[1]

STATEMENT OF THE CASE

This case involves a challenge to Amendment 73 to the Arkansas Constitution, adopted in November 1992 by an initiative petition. The relevant portion of the amendment provides that a person who has been elected to three or more terms to the U.S. House of Representatives, or to two or more terms to the U.S. Senate, is thereafter barred for life from appearing on the ballot for that office. Such incumbents may gain reelection only through write-in campaigns.

This lawsuit was filed in November 1992 in the Pulaski County Circuit Court. The circuit court granted summary judgment for the plaintiffs, finding the law an impermissible, state-imposed qualification for federal

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[1]Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

office. Pet. App. at 49a. The Arkansas Supreme Court affirmed. Pet. App. at 14a.

SUMMARY OF ARGUMENT

By imposing term limits on Members of Congress, the State of Arkansas baldly asserts a power to influence the election of federal legislators. The effort is plainly inconsistent with the text, history, and consistent judicial construction of the federal Constitution.

First, the Qualification Clauses do not authorize states to add new qualifications for federal office, and have historically been interpreted to deny such a power by implication. The qualifications of federal legislators are governed by the Constitution, and do not fall within the residual state power to regulate private conduct. By imposing ballot access restrictions on certain incumbent candidates for federal office with the express purpose, and almost certain effect, of barring reelection, Arkansas has attempted to impose an additional qualification for federal office that must be rejected.

Arkansas identifies no other source of constitutional authority that permits interference with the outcome of federal elections. The Ninth and Tenth Amendments preserve only preexisting powers of the states, and confer no new power over federal offices created by the Constitution. Nor can the term limits amendment be justified as a permissible regulation of the time, place, or manner of congressional elections. Its sole and explicit purpose is to prevent the reelection of designated congressional officeholders, an effort to control the outcome of a federal election plainly unauthorized by Article I, § 4.

Accordingly, these *amici* respectfully urge this Court to affirm the decision of the Arkansas Supreme Court.

ARGUMENT

A. AMENDMENT 73 IMPERMISSIBLY IMPOSES QUALIFICATIONS ON CANDIDACY FOR THE UNITED STATES CONGRESS IN VIOLATION OF ARTICLE I OF THE UNITED STATES CONSTITUTION

1. Article I Establishes the Exclusive Qualifications for Congress and No State May Demand More

The initial question before the Court is whether the explicit qualifications for Congress established by the Constitution are exclusive. In addressing this question, the Court must consider the constitutional text itself, the debate over the document, the historical context in which it was adopted, and the construction given the clauses by relevant authority.

This inquiry is guided by the Court's examination of these same materials in resolving the closely related question of congressional power to add qualifications in *Powell v. McCormack*, 395 U.S. 486 (1969). After an exhaustive analysis of the Qualifications Clause, the *Powell* Court concluded that the qualifications established by the Constitution are exclusive. That conclusion controls this case.

a) The Constitutional Text

Constitutional construction must begin with the text of the document itself. *Nixon v. United States*, 113 S. Ct. 732, 737 (1993); *Wright v. United States*, 302 U.S. 583, 588 (1937). Article I, §§ 2 and 3, establish national, uniform qualifications for federal representatives and senators: age,

citizenship, and residency.[2] Neither provision, on its face, grants either Congress or the States any authority to impose additional qualifications.

The plain and natural meaning of the constitutional text, therefore, is that such authority does not exist. This interpretation, moreover, is most consistent with the Framers' goal of allowing the broadest possible range of citizens to stand for federal election. *Powell*, 395 U.S. at 547 ("A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them.' As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself") (citations omitted); *The Federalist* No. 52, at 360 (J. Madison) (Bourne ed., 1917) ("Under these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any

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[2]Although other sections of the Constitution provide additional restrictions, these are almost all designed to address *all* federal officials, not just members of Congress. *See* U.S. Const. amend. XIV, § 3 (disqualification for insurrection or rebellion); art. I, § 3, cl. 7 (impeachment); art. I, § 6, cl. 2 (prohibition on holding federal office while serving in Congress); art. VI, cl. 3 (oath to uphold Constitution); art. IV, § 4 (Republican form of government). Even if these were considered as additional constitutionally based "qualifications," they hardly suggest that either Congress or the states can add others. *See Powell*, 395 U.S. at 520 n.21 (declining to address question of whether other constitutional restrictions constitute "qualifications"). The same is true with respect to the Religious Test Clause, U.S. Const., art. VI. By its own terms, that clause applies to "any office or public trust under the United States."

particular profession of religious faith.").[3] It is also consistent with the Framers' design of a *national* legislature, with defined state representatives and uniform terms of office.

This reading of the constitutional text is further supported by the power that *was* given to the states: the power to regulate the electoral *process* in the Times, Places, and Manner Clause. U.S. Const., art. I, § 4. While this provision does authorize state regulation of elections, subject to congressional alteration, it certainly does not authorize states to propose additional *qualifications* for federal office. This conclusion follows directly from *Powell*, which held that Congress had no such power. Since both state power *and* congressional power over Congressional elections are derived from Section 4, and since Congress clearly has no power to add qualifications (*Powell*), it necessarily follows that *neither* Congress *nor* the states may enact additional qualifications.

Finally, Article I, § 5 provides that each House shall be "the Judge of the Elections, Returns, and Qualifications of its own Members." As this Court held in *Powell*, the power thereby granted to the House and to the Senate is limited to judging those qualifications listed in the Constitution. 395 U.S. at 548. That conclusion strongly suggests the absence of any state power to add additional qualifications.[4]

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[3]*See also Signorelli v. Evans*, 637 F.2d 853, 859 (2d Cir. 1980) (recognizing "the expressed intent of the Framers to maintain broad public choice of elected representatives"); 2 Max Farrand, *The Records of the Federal Convention of 1787*, at 121 (rev. ed. 1937) ("2 Farrand"); 2 *Elliot's Debates on the Federal Constitution* 257 (1836); Pet. App. at 14a.

[4]Indeed, provisions granting state legislatures the power to judge their own members' qualifications were commonplace in state constitutions of the period but "[t]here is, so far as appears, no instance in which a State Legislature, having such a provision in its

b) The Historical Record

The clear import of the text also finds support in the debate over the Constitution and in its historical context.[5]

Term limitations were commonplace prior to the adoption of the Constitution and were expressly included in the Articles of Confederation. Arts. Confed. V (1777). Although several states imposed additional rotation in office provisions during this time period, Pennsylvania later repealed its restrictions, noting that it "deprived [the people] of the right of choosing those persons whom they would prefer." Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 439 (1969) ("*The Creation of the American Republic*"). Massachusetts, too, abandoned term limits in 1780. *Id.* at 436. As Charles Warren explained, such provisions "had worked very badly in [the Continental] Congress and had served to prevent the re-election of delegates just at a time when they were becoming most valuable to their states. This had been notably the case with reference to James Madison himself." *The Making of the Constitution* 613. As a result, the American public became "increasingly disillusioned with

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Constitution, undertook to exclude any member [of Congress] for lack of qualifications other than those required by such Constitution." Charles Warren, *The Making of the Constitution* 423 (1928) ("*The Making of the Constitution*").

[5]These materials were comprehensively surveyed by this Court in *Powell*, and many of the perennial objections raised over the years by various commentators, and raised again by petitioners here, were considered and rejected. *See, e.g., Powell*, 395 U.S. at 533-34 & 527 n.75 (minimum floor argument), 539 (negative phrasing argument), 520 n.41 (other constitutional restrictions argument). *See also* Levy, *Can They Throw the Bums Out? The Constitutionality of State Imposed Congressional Term Limits*, 80 Geo. L.J. 1913, 1933 (1992). No persuasive argument has been advanced to abandon *Powell*.

the political and social effects of rotation." *The Creation of the American Republic* 140-41.

(1) The Constitutional Convention

This experience with term limits was still quite recent when the Philadelphia Convention was convened to address the flaws evident in the Articles of Confederation. At the outset of the Constitutional Convention, Governor Edmund Randolph of Virginia offered the initial proposal on the qualifications of candidates for the national legislature. The "Virginia Plan" included property requirements, residency standards, restrictions on activities after service in the legislature, and, significantly, a rotation system of term limits. *See* 1 1787 *Drafting the U.S. Constitution* 238 (Wilbourn E. Benton ed., 1986). The rotation provision, however, "seemed of so little value that [it was] stricken out on motion of [Charles] Pinckney on June 12, [1787] without opposition and without recorded discussion, and never heard of again." Thornton Anderson, *Creating the Constitution* 123 (1993). *See also* 1 Farrand, at 217.

The ensuing debate at the Constitutional Convention demonstrates that the qualifications adopted were intended by the Framers to be fixed, uniform, and exclusive. In the context of discussing the proposed property qualification, Madison argued that a recognition of the power to add qualifications would necessarily include the power to undermine the provisions specified in the text. Characterizing the ability to add qualifications as "an improper and dangerous power," 2 Farrand, at 250, Madison argued:

> [t]he qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those [qualifications] of

> either [the electors or the elected], it can by degrees subvert the Constitution.

Id. Unless the qualifications were fixed in the Constitution, Madison warned, "[q]ualifications founded on artificial distinctions may be devised by the stronger in order to keep out partisans of a weaker faction." *Id.*[6]

Petitioners argue that Madison was disputing only the power of *Congress* to add qualifications. But Madison's argument that the qualifications are exclusive applies with equal force to the states. Indeed, Madison's argument would be far less compelling absent a presupposition that the states, too, lack the power to impose qualifications.[7] All

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[6]Indeed, it is not difficult to imagine the variety of additional qualifications states might impose if petitioners are correct that the Qualification Clauses state only minimum qualifications. States could bar all but former state legislators from service in Congress, or from appearing on the ballot. Others might bar all but those with extended residency in the state, or residency within particular parts of the state, or those born in the state, or born in the United States. And if states could impose such restrictions as "times, places, or manner" regulations, then Congress, too, could "make or alter" those restrictions. It might, therefore, bar all but incumbent House members from running for the Senate, or ban all state legislators from running for Congress. This is, of course, precisely what Madison feared and why he thought the power "improper and dangerous." *2 Ferrand*, at 250.

[7]As Congressman Key argued during the debate over Rep. William McCreery's contested election in 1807, the Framers who raised objections to the proposed property qualification

> never supposed the qualifications were not fixed by the Constitution; for, men of such talents and reputations would never have urged that as an objection to the Constitution if, for a moment, they had supposed the Legislatures of the States competent to make such alteration.

of the states at that time imposed some form of property qualification for state legislators, with the sole exception of New York. *The Making of the Constitution* 416-17. Had it been understood that such restrictions could be imposed by the states on their federal representatives, there would have been little need for the extended debate over the proposed qualification. And it would have been odd, to say the least, for Madison to have argued that the qualifications were "fundamental" to a Republican form of government and were "fixed by the Constitution," if he in fact meant to say that the qualifications were *unfixed* and could be altered by the states at will. Such an interpretation stands Madison's comments on their head.

The Convention agreed with Madison and "defeated the proposal to give to Congress power to establish qualifications in general, by a vote of seven states to four; and it also defeated the proposal for a property qualification, by a vote of seven states to three." *The Making of the Constitution* 421.

Several of the parties and *amici* argue that a provision that would have expressly made the Qualifications Clause exclusive was deleted by the Committee of Detail during the Constitutional Convention. *See, e.g.*, Brief for Petitioners U.S. Term Limits, Inc., et al., at 39. These parties and *amici* argue that this Court should infer from this that the Convention meant to allow the states power to impose additional qualifications. The Convention, however, might also have thought the language surplusage and the listed qualifications exclusive. Moreover, the Convention rejected proposals to give Congress power to establish additional qualifications, and defeated a variety of additional qualifications proposed as amendments to the

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17 *Annals of Cong.* 911-15 (1807), *reprinted in* 2 *The Founders' Constitution* 80-81 (Philip B. Kurland & Ralph Lerner eds., 1987).

Constitution itself. Drawing inferences from legislative inaction is treacherous business under the best of circumstances. At most, the history of the Convention demonstrates that the Framers considered a variety of arrangements, adopted some and rejected others, and determined to render the qualifications "defined and fixed in the Constitution." *The Federalist* No. 60, at 414 (A. Hamilton) (Bourne ed., 1917). *See also* 2 Farrand, at 250 ("qualifications . . . fixed by the Constitution.") (J. Madison).[8]

(2) The Ratification Debates

The evidence from the ratification debates that followed the Convention further confirms that the qualifications were fixed in the Constitution. In explaining why the Constitution exclusively defines the qualifications for federal office but not the qualifications for voters, Madison wrote:

> The qualifications of the elected being less carefully and properly defined by the State Constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and

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[8]Petitioner U.S. Term Limits argues that "[w]hen the handful of disqualifications in Article I was adopted, no one said they were exclusive, much less put such a proposition to a vote." Brief for Petitioners U.S. Term Limits, et al., at 41. In fact, John Dickinson, a delegate to the Convention from Delaware, had opposed "any recital of qualifications in the Constitution" for "it was impossible to make a compleat one and a partial one would by implication tie up the hands of the Legislature from supplying the omission." 2 Ferrand, at 126. This argument, of course, is based upon the Latin maxim *expressio unius exclusio alterius*. Since the Framers were very well aware of this principle and *rejected* Dickinson's argument, it is in fact quite likely that the Convention understood the effect of a limited list of qualifications and intended that very result.

> regulated by the Convention. . . . Under these reasonable limitations, the door of this part of the Federal Government, is open to merit of every description[.]

The Federalist No. 52, at 360 (J. Madison) (Bourne ed., 1917).

Though rotation provisions were summarily rejected as qualifications at the Convention, during the course of the ratifying debate the issue became a major source of disagreement. But even the Anti-Federalists did not contemplate a state power to impose term limitations.

The Anti-Federalists feared that, absent federal constitutional term limits, Congress would become "a class unto themselves." Levy Mahoney, *The Framing and Ratification of the Constitution* 206 (1987). This urgent argument on the "need" for the inclusion of term limits in the Constitution rests on an understanding that the several states lacked the power to impose federal term limitations.

The Federalists were equally emphatic in advocating against the adoption of any term limit provision. At the New York ratifying convention Robert Livingston argued:

> The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights. This rotation is an absurd species of ostracism—a mode of proscribing eminent merit, and banishing from stations of trust those who have filled them with the greatest faithfulness. . . . We all know that experience is indispensably necessary to good government. Shall we, then, drive experience into obscurity?

2 *Elliot's Debates on the Federal Constitution* 293 (1836). Alexander Hamilton concurred:

> [I]n contending for a rotation, the gentlemen carry their zeal beyond all reasonable bounds. I am convinced that no government, founded on this feeble principle, can operate well: I believe also that we shall be singular in this proposal. . . . When a man knows he must quit his station, let his merit be what it may, he will turn his attention chiefly to his own emolument . . . This reasoning shows that a *rotation* would be productive of many *disadvantages*: under particular circumstances, it might be extremely inconvenient, if not fatal to the prosperity of our country.

Id. at 320-21 (emphasis in original). Hamilton, in fact, devoted *The Federalist No. 72* to articulating his objections to rotation in office provisions.

The events during the period immediately following the ratification of the Constitution further confirm the Framers' understanding that states were precluded from imposing term limitations under the Constitution. Most notably, in spite of the fervent advocacy of the Anti-Federalists in support of term limits throughout the ratification period, no state adopted term limit restrictions on its members of Congress.[9]

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[9]Petitioner U.S. Term Limits argues that since 1788 states have enacted additional qualifications. Brief for Petitioners U.S. Term Limits, Inc., et al., at 25-27. Many of these state provisions, however, are wholly unremarkable exercises of state power to regulate state office holders, or to regulate the electoral process, or to bar "sore loser" candidacies, such as those upheld by this Court in *Storer v. Brown*, 415 U.S. 724 (1974). Curiously, and perhaps more tellingly, notwithstanding the strenuous efforts made during the Constitutional Convention and thereafter by the Anti-Federalists to adopt rotation-in-office provisions, U.S. Term Limits fails to identify any *term limit provisions* passed by the states in the years following the adoption of the Constitution. *See also* Brief for the

The early Congressional actions interpreting the Qualifications Clauses are equally telling. In *Powell*, the Supreme Court discussed the case of Representative William McCreery, whose seating was challenged in 1807 for failure to meet Maryland's district-residency qualification. *Powell*, 355 U.S. at 542. The House Committee of Elections concluded that "neither the State nor the Federal Legislatures are vested with authority to add to those qualifications, so as to change them." *Id.* at 543 (quoting 17 *Annals of Cong.* 871 (1807)).

c) Scholarly Commentators

Prominent scholars of American constitutional history have reached the same conclusion. Justice Story discussed at length the meaning of the Qualifications Clauses and the conspicuous absence of any residual state authority to speak on this matter. 2 Joseph Story, *Commentaries on the Constitution of the United States* §§ 624-629 (1891). Story observed that at the time of the Convention, the thirteen states imposed a wide variety of qualifications on their state legislators. Although it would have been more expedient and convenient for the Framers simply to allow existing state law to define the qualifications for the elected, as they did with the qualifications for voters, this issue was a "subject thought proper for regulation by the convention." *Id.* § 624. Story concluded that "when the Constitution

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State Petitioner, at 25 (arguing that historic figures have supported rotation-in-office provisions, but failing to identify *any* state term limits adopted in the early years). Although U.S. Term Limit notes that "Pennsylvania's congressional term-limits requirement continued in effect," Brief for U.S. Term Limits, Inc., et al, at 26 (citing Pa. Const., § 11 (1776)), it fails to note that Pennsylvania in fact *repealed* those provisions at its state constitutional convention called on March 24, 1789, and convened on November 24, 1789, eight months after the Constitution was ratified. *See* 5 F. Thorpe, *The Federal and State Constitutions*, at 3092 n.a (1906).

established certain qualifications, as necessary for office, it meant to *exclude all others* as prerequisites." *Id.* (emphasis added).[10] *See also The Making of the Constitution* 422 (Framers "clearly left the provisions of the Constitution itself as the sole source of qualifications.").

d) *Powell v. McCormack*

This reading of the constitutional text, purpose, and history is precisely that reached by this Court in its landmark decision in *Powell v. McCormack*, 395 U.S. 486 (1969).

In *Powell*, this Court considered whether Congress generally or one House specifically could add to the constitutional qualifications for the House of Representatives. There, this Court considered House Resolution 278, passed in 1967, which purported to exclude Adam Clayton Powell, who had been reelected by the voters of his district, from taking his seat in the House despite his constitutional qualifications of age, citizenship, and residency. *Id.* at 492. The Court initially confronted the question whether the House had the power to set additional qualifications beyond those stated in the Constitution. *Id.* at 521-22.

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[10]Justice Story's analysis is echoed by numerous influential Constitutional scholars, including Thomas Cooley, James Kent, and Charles Burdick. Judge Cooley was quoted by the court in *Hellmann v. Collier*, 217 Md. 93, 141 A.2d 908, 912 (1958), for a footnote he wrote to Justice Story's works in which he declared that "[i]t is now universally conceded that a State cannot prescribe qualifications for members of Congress, or establish disabilities. The whole subject is beyond the sphere of its powers." *See also* Charles Burdick, *The Law of the American Constitution* 160, 165 (1929) (same); Thomas Cooley, *General Principles of Constitutional Law* 268 (1891 ed.) (same); 1 James Kent, *Commentaries on American Law* 228 n.b (3d ed. 1836) (same).

The Speaker of the House, the respondent in *Powell*, argued that Congress had the power under the Constitution to be the judge of the qualifications of its own Members. *Id.* The Court, however, held that the House's power under this clause was limited to judging a Member's compliance with those qualifications *prescribed in the Constitution*. *Id.* at 521. Congress, the Court ruled, lacked the power under the Constitution to add qualifications for membership. *Id.* at 548.

The Court's holding—invalidating the attempt to exclude Powell—was grounded upon its conclusion that the qualifications established in the Constitution are exclusive. That conclusion necessarily controls the "more narrow," *id.* at 543, question of state power to add qualifications.[11] Significantly, the Court relied on historical evidence addressing *state* power to add qualifications. *Id.* at 542 (discussing Rep. William McCreery's 1807 contested election for failing to meet state-imposed qualifications). Thus, the Court's conclusion in *Powell* was necessarily founded on its determination that the qualifications established by the Constitution are exclusive.

e) Every Court to Have Considered the Issue Has Concluded That the Qualifications Clause Is Exclusive

State power to add qualifications to those established by the Constitution has been uniformly rejected by the

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[11] Although petitioners may be correct that *Powell* itself did not directly address *state* power to add qualifications, its holding and its supporting analysis necessarily foreclose any argument that states have greater power in this area. Indeed, the constitutional text itself suggests that Congress would have *greater*, not lesser, power in this area because it provides Congress, but not the states, with power to judge qualifications, U.S. Const., art. I, § 5, and Congressionally imposed qualifications would at least be uniform nationwide.

myriad of courts, both state and federal, to have addressed the question. Indeed, the issue has been litigated in many different qualification contexts and in each case, without exception, and usually without controversy, the exclusivity of the constitutional qualifications has been affirmed.

The earliest case to address this issue was *State ex rel. Chandler v. Howell*, 104 Wash. 99, 175 P. 569 (1918). The issue in *Howell* was whether a state judge could run for Congress in light of a provision in the Washington state constitution making state judges ineligible for any other office during the term for which they had been elected. 175 P. at 570. Considering both Congressional precedent and the unanimous analysis of several Constitutional scholars, the Court concluded that

> [s]o long as a candidate for membership in Congress meets the requirements set forth in the Constitution which created the office, no state has the right or authority to prevent his candidacy either by provision in its Constitution or in its statutes.

Id.

The *Howell* court's analysis is echoed in other early cases confronting the same question. For example, in *Ekwall v. Stadelman*, 146 Or. 439, 30 P.2d 1037, 1040 (1934), the court held a requirement that judges take an oath not to accept any other office during the term for which they are elected invalid as applied to federal offices. As in *Howell*, the *Ekwall* court concluded that "it is evident that the object of the Constitution in enumerating the qualifications for Representatives was that they might be uniform throughout the Union." 30 P.2d at 1039. *See also Stockton v. McFarland*, 56 Ariz. 138, 106 P.2d 328, 330 (Ariz. 1940) ("both Houses have invariably followed the rule that no qualification additional to those imposed by the Federal Constitution itself could be imposed by any state.").

Similarly, in *State ex rel. Johnson v. Crane*, 65 Wyo. 189, 197 P.2d 864 (1948), the court held that a state constitutional provision making the governor ineligible to run for any other office during his elected term could not prevent the governor from running for the United States Senate. In the course of its opinion, the court considered congressional precedent, including the challenge to Illinois Senator Lyman Trumball on the grounds that a provision of the Illinois Constitution made him ineligible for office.

The court approvingly quoted Senator Crittenden's response to the Trumball challenge:

> '[t]he whole object of the Constitution of the United States could not be more completely subverted by eradicating from the Constitution the positive qualifications which it requires, than, it would be in substance, and virtually, by superadding qualifications. If the Constitution has not thought proper to make further qualifications, what is the reason of it? It is because its framers did not desire any other to be made. Did they intend carefully to make these qualifications, and then leave it to the States to make any which, according to their casual will, or wish, or caprice, they might, from time to time, make?'

197 P.2d at 869 (quoting *The Legal Qualifications of Representatives*, 3 Am. L. Rev. 427 (1868-69)).

Subsequent cases have all reached the same conclusion and many have noted the remarkable unanimity on this issue. *See Dillon v. Fiorina*, 340 F. Supp. 729, 731 (D.N.M. 1972) ("That a state cannot add to or take away from these qualifications is well settled"); *Stack v. Adams*, 315 F. Supp. 1295, 1297 (N.D. Fla. 1970) ("That the qualifications prescribed in the United States Constitution are exclusive and that state constitutions and laws can neither add to nor take away from them is universally

accepted and recognized"); *Buckingham v. State*, 42 Del. 405, 35 A.2d 903, 905 (1944) ("The authorities are uniform . . . ."); *Stumpf v. Lau*, 108 Nev. 826, 839 P.2d 120, 123 (1992) (noting that because the proposition is so obvious and there is no authority to the contrary, "this point need not be overly belabored"); *Danielson v. Fitzsimmons*, 232 Minn. 149, 44 N.W.2d 484, 486 (1950) (finding that to the best of the court's knowledge "[a]ll authorities . . . are in accord. None to the contrary[.]"); *In re Opinion of Judges*, 79 S.D. 585, 116 N.W.2d 233, 234 (1962) ("[b]ecause of the *unanimity* in these cases we see no need to review them here") (emphasis added).

Indeed, various lower courts have consistently struck down many and varied types of state-imposed qualifications for federal office, including term limits,[12] district residency requirements,[13] loyalty oath requirements,[14] and

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[12]*See, e.g., Thorsted v. Gregoire*, 841 F. Supp. 1068, 1081 (W.D. Wash. 1994); *Stumpf*, 839 P.2d at 123 ("The term limits initiative clearly and 'palpably' violates the qualifications clauses of Article I of the United States Constitution."); Pet. App. at 14a. *See also Plugge v. McCuen*, 310 Ark. 654, 841 S.W.2d 139, 150 (1992) (Dudley, J., dissenting).

[13]*See, e.g., Dillon*, 340 F. Supp. at 731 (two-year residency requirement rejected because "that a state cannot add to or take away from these qualifications is well settled"); *Exon v. Tiemann*, 279 F. Supp. 609, 613 (D. Neb. 1968) (states cannot require House candidates to reside in the district in which they were nominated); *Hellmann v. Collier*, 141 A.2d at 911 (striking similar law because "no state has the power to fix the qualifications of Representatives in Congress"); *State ex rel. Chavez v. Evans*, 79 N.M. 578, 446 P.2d 445, 448 (1968) (per curiam) (invalidating similar law because "the constitutional qualifications . . . exclude all other qualifications, and state law can neither add to nor subtract from them").

[14]*See, e.g., Shub v. Simpson*, 196 Md. 177, 76 A.2d 332, 341, *appeal dismissed*, 340 U.S. 881 (1950) (anti-subversion declaration

prohibitions on campaigns for federal office by those convicted of felonies,[15] those who are state judges,[16] and

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requirement held unconstitutional because "a state cannot in any manner impose additional qualifications upon a candidate for representative in Congress"); *In re O'Connor*, 173 Misc. 419, 17 N.Y.S.2d 758, 760 (N.Y. Super. Ct. 1940) (rejecting qualification that House candidate abandon his advocacy of international communism or abdicate his position in the communist party).

[15]*See, e.g., Application of Ferguson*, 57 Misc. 2d 1041, 294 N.Y.S.2d 174, 176 (N.Y. Super Ct. 1968) (state law making convicted felons ineligible to seek public office inapplicable to U.S. Senate candidate); *Danielson v. Fitzsimmons*, 232 Minn. 149, 44 N.W.2d 484, 486 (1950) (holding that state constitutional provisions prohibiting felons from being candidates for any elective office were inapplicable to federal offices because "[t]he qualifications of those who aspire to or hold [federal office] are prescribed by the United States constitution, and the state may not enlarge or modify such qualifications"); *State ex rel. Eaton v. Schmahl*, 140 Minn. 219, 167 N.W. 481, 481 (1918) (per curiam) (state constitutional provision prohibiting felons from candidacy held inapplicable to candidates for federal office because the "qualifications of those aspiring to or holding the [federal] position are . . . prescribed by the Federal Constitution, which the state is without authority to modify or enlarge in any way").

[16]*See, e.g., Stockton*, 106 P.2d at 331 (finding provision of Arizona constitution providing that state judges shall not be eligible for any other public office during elected term does not prohibit a judge from running for Congress); *Buckingham*, 35 A.2d at 905 (exclusion of judges during term of office and six months thereafter held unconstitutional because "a State may not change those [Constitutional] qualifications or add others thereto"); *State ex rel. Santini v. Swackhamer*, 90 Nev. 153, 521 P.2d 568, 570 (1974) (per curiam) (declaring invalid state constitutional provision that prohibited state judges from running for the House of Representatives during their term of office); *Riley v. Cordell*, 200 Okla. 390, 194 P.2d 857, 862 (1948) (state statute making justices of Oklahoma Supreme Court ineligible for any other public office during term of office could not prevent justice from becoming

other state officers.[17]

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candidate for U.S. Senate); *State ex rel. Wettengel v. Zimmerman*, 249 Wis. 237, 24 N.W.2d 504, 508-09 (1946) (finding similar state constitutional provision inapplicable to federal office seekers).

[17]*See, e.g., Stack v. Adams*, 315 F. Supp. 1295, 1297 (N.D. Fla. 1970) (state could not require state officeholders to resign before running for Congress); *State ex rel. Pickrell v. Senner*, 92 Ariz. 243, 375 P.2d 728, 730 (1962) (same because "[a] state legislature is without power to add 'qualification' requirements to a federal office"); *Lowe v. Fowler*, 240 Ga. 213, 240 S.E.2d 70, 71 (1977) (same because the Constitution "provides the sole and exclusive qualifications" for federal House of Representatives); *Richardson v. Hare*, 381 Mich. 304, 160 N.W.2d 883, 887-88 (1968) (same because the Constitution "exclusively sets forth the qualifications of the members of congress"). Although several recent cases have suggested that such "resign-to-run" statutes do not constitute impermissible state-imposed "qualifications," even those cases have uniformly acknowledged that "the three qualifications contained in the [Qualifications] Clause—age, citizenship, and residency—are exclusive, and that neither Congress nor the states may require more of a candidate." *Joyner v. Mofford*, 706 F.2d 1523, 1528 (9th Cir.), *cert. denied*, 464 U.S. 1002 (1983). *See also Signorelli*, 637 F.2d at 858 ("[t]he principle that a branch of Congress cannot add to, subtract from, or modify those qualifications, *ibid.*, applies with equal force to the states."); *Adams v. Supreme Court*, 502 F. Supp. 1282, 1291 (M.D. Pa. 1980) (same); *Oklahoma State Election Bd. v. Coats*, 610 P.2d 776, 778 (Okla. 1980) (same); *Alex v. County of Los Angeles*, 35 Cal. App. 3d 994, 111 Cal. Rptr. 285, 293 (Cal. Dist. Ct. App. 1973) (same). *Clements v. Fashing*, 457 U.S. 957 (1982), involved a slightly different statute, treating a candidacy for any office "of profit or trust under the laws of this State or the United States," if commenced more than a year prior to the expiration of a state officer's term, as an "automatic resignation." *Id.* at 960. The statute did not bar any candidacy, restrict access to the ballot, or otherwise regulate the electoral process. The clear purpose of the statute at issue in *Clements*, as in *Joyner* and *Signorelli*, was instead to regulate the conduct of state officers. The statute was

Petitioners here contend that all of these courts, for all of these years, were simply wrong on this critical issue and that, in fact, states *do* have such power. This argument should be dispatched with the same summary dismissal the argument has merited in all of the many prior cases to have considered it.

2. The Term Limits Amendment Is an Additional Qualification for Federal Office, Not a Regulation of the Electoral Process

In the case at hand, the restrictions imposed by the term limits amendment constitute additional state-imposed "qualifications" for federal office. The depth of legislative experience held by a candidate is a classic personal characteristic—like age, citizenship, and residency—wholly unrelated to any legitimate state interest in the electoral process or in the conduct of state officeholders. No court has ever recognized as legitimate a state interest in barring or burdening a particular class of otherwise constitutionally qualified candidates for Congress to make it more difficult or impossible to win. The term limits amendment's stated purpose, and almost certain effect, is to do just that. As a result, it constitutes a "qualification," and must be rejected.

a) Restrictions Based on Personal Characteristics of Candidates Constitute Additional "Qualifications"

Appellants contend that, because the term limits law allows the remote possibility of a write-in candidacy, it constitutes nothing more than a mere "ballot access" measure—an exercise of state power under the "Times, Places, and Manner" Clause of the Constitution. U.S.

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upheld against First and Fourteenth Amendment challenges without discussion of the Qualification Clauses.

Const., art. I, § 2. This argument should be rejected. While a state certainly has the power to regulate the electoral process to impose "some sort of order, rather than chaos" on the electoral process, *Burdick v. Takushi*, 112 S. Ct. 2059, 2063 (1992), and additionally has "plenary power to regulate the conduct of its own elected officials," *Joyner*, 706 F.2d at 1528, neither provides a ground for imposing qualifications under the guise of such regulatory interests.

On such reasoning, states could impose virtually any qualification—property ownership, lack of felony convictions, narrow district residency requirements, or loyalty oath requirements—all by simply phrasing the qualification as a "ballot access" measure. The argument that any qualification can be effectively imposed so long as the most remote possibility of a write-in candidacy is left available should be rejected outright. Constitutional protections—particularly structural provisions allocating power between the federal and state governments—cannot be so easily evaded by slight of hand. *Frost & Frost Trucking Co. v. Railroad Comm'n of Calif.*, 271 U.S. 583, 593-94 (1926).

The argument advanced by respondent representatives Jay Dickey and Tim Hutchinson is similarly flawed. The respondent representatives argue that Article I, § 5 of the Constitution makes each House of Congress "the Judge of the Elections, Returns and Qualifications of its own Members." The representatives argue that, because this term limit is framed as a "ballot access" measure, there is nothing for the House or Senate to judge and, accordingly, Amendment 73 cannot constitute a qualification. This wooden argument proves far too much and must be rejected. Again, states could impose virtually any qualification—higher age requirements, different residence requirements, or the like—so long as they were framed in terms of a mere ballot access provision, even if baldly designed to "limit the terms of elected officials." Arkansas

Const., amend. 73 (Preamble). Were such a course available to the states, then the exclusiveness of the Qualifications Clause would be rendered utterly meaningless, for the states could impose any qualification they wished, so long as they complied with the "ballot access" form. The argument places form above substance and should be rejected.

Ballot access limitations for federal elections keyed to a candidate's personal characteristics advance neither legitimate state interests authorized by Article I, § 4 in regulating the electoral process, nor in regulating the conduct of state officeholders. Rather, such restrictions are no more or less than attempts by the state to control the result of the congressional election. The state's purported interest in "leveling the playing field" is premised on the inference that the voters' "true" preferences are not reflected in their votes and that the state may therefore intervene to impede candidates for federal office it thinks too popular in order to promote others. Such an effort can only be described as an attempt to *disqualify* a class of federal candidates. It is wholly foreign to our federal system of government and the constitutionally designed framework for congressional elections.

b) The Stated Purpose and Almost Certain Effect of the Term Limits Law Is to Limit Terms by Effectively Disqualifying Incumbents From Reelection

Moreover, the stated purpose of the term limit law is not to regulate evenhandedly the "manner" of the congressional election, but to determine the outcome. It is therefore designed to, and clearly does, operate as an additional "qualification" for federal office.

By its express terms, Amendment 73 is plainly intended to "limit the terms of elected officials." Arkansas

Const., amend. 73 (Preamble). Indeed, the Preamble recites in detail the supposed evils of incumbency. Its purpose could not be more clearly stated to remove this class of constitutionally qualified candidates by limiting their terms. The state petitioner acknowledges that "a purpose and hoped-for effect of Amendment 73 is to increase rotation in office." Brief for the State Petitioner, at 39. And respondent Representatives Dickey and Hutchinson concede that Amendment 73 "will undoubtedly make it more difficult for those individuals to win reelection, and may well result in electoral defeat for many incumbents." Brief for Respondent Representatives Jay Dickey and Tim Hutchinson, at 10.

Thus, the stated purpose, design, and almost certain effect of the term limits law is to limit terms. "In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impacts on voters." *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). The narrow possibility of a write-in candidacy does not magically transform a plainly unconstitutional qualification into a permissible ballot access measure.[18]

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[18]Indeed, every court to have considered the issue has rejected the attempt to disguise a qualification as a "ballot access" regulation. *See, e.g., Thorsted*, 841 F. Supp. at 1082; *Stumpf*, 839 P.2d 120; Pet. App. at 14a. Flat term limit prohibitions have also been recognized as "qualifications." *See Miyazawa v. City of Cincinnati*, 825 F. Supp. 816, 822 (S.D. Ohio 1993) (term limits recognized as an "additional condition for candidate eligibility"); *Legislature v. Eu*, 54 Cal. 3d 492, 286 Cal. Rptr. 283, 816 P.2d 1309, 1325 (1991) (term limits on state officials constitute additional "qualifications"), *cert. denied*, 112 S. Ct. 1292 (1992). The Court should note that the respondents in *Eu*, with the assistance of some of the same *amici* supporting petitioners here, "characteriz[ed] the term limitation . . . as additional candidacy *qualifications* akin to age or residency." 816 P.2d at 1325 (emphasis added).

B. NEITHER THE NINTH NOR TENTH AMENDMENTS RESERVE POWER TO THE STATES TO ADD QUALIFICATIONS FOR FEDERAL OFFICE

Contrary to petitioners' assertion, the Ninth or Tenth Amendments cannot be read to reserve any power to the states to add qualifications for the Congressional offices first established by the Constitution itself. Those amendments reserved only power held by the states *prior* to the adoption of the Constitution; they do not purport to confer new or additional power to the states. *New York v. United States*, 112 S. Ct. 2408, 2418 (1992). Since the qualifications for representatives in the newly created national government were comprehensively regulated in the Constitution and, by definition, did not pre-date that document, no residual state power is reserved by the Ninth and Tenth Amendments.[19]

C. AMENDMENT 73 CANNOT BE JUSTIFIED AS A "TIMES, PLACES, AND MANNER" REGULATION

Even if this Court were to determine that the term limits amendment does not constitute an additional qualification, it must nonetheless be rejected. Although the states retain the power to impose reasonable regulation of the time, place, and manner of elections, and broad

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[19]Precisely this point was made by Justice Story in his Commentaries in addressing this same Ninth and Tenth Amendment argument: "No state can say[] that it has reserved[] what it never possessed." 2 Joseph Story, *Commentaries on the Constitution of the United States* §§ 625-626 (1st ed. 1833). Even prominent term limit supporters concede this point. *See* Hills, *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. 97, 103 (1991) ("The power to set qualifications for federal officials is probably not an original power retained by the states under the Tenth Amendment").

authority to regulate the conduct of their own state officers, that regulatory authority is plainly not unbounded and they most assuredly do not have any power under Article I, § 4 to control the outcome of a congressional election.

1. The Scope of the State's Power to Regulate Federal Elections Is Not Unlimited

a) State Power to Regulate the "Times, Places, and Manner" of Federal Elections

A state's power to regulate how federal elections are conducted is derived from Article I, § 4 of the Constitution. This Court has upheld state efforts to impose "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Anderson*, 460 U.S. at 788 n.9. States may regulate elections to ensure they are "fair and honest" and that "some sort of order, rather than chaos," accompanies the democratic processes. *Storer*, 415 U.S. at 730. States, accordingly, have a legitimate interest in preventing voter confusion or the presence of frivolous candidates, *Anderson*, 460 U.S. at 788 n.9, in minimizing "unrestrained factionalism," *Storer*, 415 U.S. at 736, or in limiting "the number of run-off elections." *Lubin v. Panish*, 415 U.S. 709, 712 (1974).

Under Article I, § 4, the state's interest is in regulating the *process* of congressional elections, not the outcome. And, although particular candidates may be excluded or burdened in the process, that is a side-effect of the regulation, not its purpose. In all cases the state's power is aimed at ensuring that candidates with a significant degree of public support appear on the ballot. Term limit provisions seek the opposite—to exclude certain candidates precisely because they have "too much" public support as evidenced by prior electoral victories. *Cf. Buckley*, 424 U.S. at 48-49.

b) State Power to Regulate State Office Holders

In addition to their power under the Times, Places and Manner Clause, states retain "plenary power to regulate the conduct of [their] own elected officials." *Joyner*, 706 F.2d at 1528. On this ground, the so called "resign-to-run" statutes, which typically prohibit state officials from running for another elective office while serving their state term, have been upheld as a valid exercise of the state power to regulate the conduct of state office holders. *See supra*, at 20-21 n.16.[20]

2. The Term Limits Law Is Not a Valid "Times, Places, and Manner" Regulation

The term limit law cannot be defended as a valid time, place, and manner regulation. Closing the ballot to a class of qualified federal candidates who enjoy strong popular support in order to hinder their election has never been recognized as a power authorized by Article I, § 4.

This new interest is characterized by the petitioners as making elections "more representative," Brief for The State Petitioner, at 26, because it allegedly "levels the playing field" between incumbents and nonincumbents. *Id.*; Brief of the Allied Educational Foundation as *Amicus Curiae* in Support of Petitioners, at 10. That is an odd characterization since the purpose of the term limit law is to exclude certain incumbents from the "playing field" entirely.

In any event, the power to intervene in federal elections is not one the Framers chose to allocate to the states in Article I, § 4. And, in the context of federal elections, the

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[20]Whether states have broader power to impose term limits on *state* officers is not at issue in this case and these *amici* express no view on that issue.

state's asserted interest in protecting voters from their own "uninformed" choices is not one that this Court has accepted as legitimate, even if the term limit law could somehow be described as a time, place or manner regulation. As the Court observed in rejecting Ohio's effort to bar John Anderson from participating in that state's presidential primary because of his failure to comply with an early filing deadline: "A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Anderson*, 460 U.S. at 798.

In short, Amendment 73 represents an effort to influence the outcome of federal elections that goes beyond the states' power to regulate the federal electoral process under Article I, § 4. Under the constitutional system created by the Framers, it cannot be sustained.

CONCLUSION

For the reasons stated, *amici* ACLU and ACLU-W respectfully suggest that this Court affirm the decision below.

RESPECTFULLY SUBMITTED this 17th day of October, 1994.

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